Nos. 05-1571 & 05-1573

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,

Petitioner,

-and-

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a federal court bound to accept uncritically the self-interested interpretation of foreign law offered by a foreign-government litigant?

2. Whether the Court of Appeals erred in applying Rule 69 of the Federal Rules of Civil Procedure to determine the susceptibility of certain funds held by Pertamina in its own name to attachment and execution where Petitioners have identified no federal common law holding that Rule 69 is inapplicable in cases against foreign states.

STATEMENT PURSUANT TO RULE 29.6

Respondent Karaha Bodas Company, L.L.C. has no parent corporation and no publicly held company owns ten percent or more of its stock.

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INTRODUCTION

Respondent Karaha Bodas Company, L.L.C. ("KBC") respectfully submits this brief in opposition to the Petitions for a Writ of Certiorari (the "Petitions") filed on June 7, 2006 by Petitioner PT Pertamina (Persero) (f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara) ("Pertamina") and by Petitioner Ministry of Finance of the Republic of Indonesia ("Government"). For all the reasons that follow, KBC respectfully submits that the Court of Appeals' decisions were correct in all respects, that there are no compelling reasons justifying a grant of *certiorari* by this Court, and that the Petitions should be denied in their entirety.

STATUTES AND RULE INVOLVED

In addition to the statutes identified in the respective Petitions, the following statutes are pertinent to the correct resolution of this case: Fed. R. Civ. P. 69; N.Y. C.P.L.R. § 5201; N.Y. C.P.L.R. § 5222. The relevant provisions of each of these statutes are reproduced at Resp't App. 1a-10a.

COUNTER-STATEMENT OF THE CASE

The instant Petitions mark the third time that Pertamina and the Government have sought to bring this straightforward commercial dispute before this Court. As described below, these Petitions are part of Pertamina and the Government's unrelenting effort to evade the rule of law and avoid payment of a lawful arbitration award rendered against Pertamina in 2000. Although Pertamina has revenues of over $20 billion, it resolutely refuses to pay the award or the U.S. judgment enforcing it. As part of their campaign to avoid Pertamina's legal obligation, Petitioners have used every available device

to challenge the decisions of the U.S. District Court for the Southern District of New York ("District Court") and the U.S. Court of Appeals for the Second Circuit ("Court of Appeals") that found Pertamina to be the owner of approximately $750 million of the over $8 billion that have passed through certain New York bank accounts since February 22, 2002.

While the Petitions purport to identify unresolved questions of federal law and to raise issues under the FSIA, 28 U.S.C. § 1601 *et seq.*, the decisions sought to be reviewed here were decided solely under New York and Indonesian law. The courts below acknowledged Indonesia's sovereign immunity at the threshold of these proceedings and ruled repeatedly that funds belonging to Indonesia were not subject to execution. Consequently, the remaining proceedings turned on Indonesian law principles governing Pertamina's ownership rights in the funds at issue, and on the construction of Article 52 of the New York Civil Practice Law and Rules, which governed KBC's enforcement rights in the funds. None of the arguments proferred by Pertamina and the Government justifies granting the Petitions.

The Arbitral Award and Confirmation Proceedings

On December 18, 2000, a Swiss arbitral tribunal awarded KBC $261.1 million as a result of Pertamina's breach of certain agreements related to the development of a geothermal energy plant in Indonesia. Because Pertamina refuses to pay the award, KBC has been forced to commence confirmation and enforcement proceedings in the United States, Hong Kong, Singapore, and Canada, and the arbitral award has been confirmed by the courts of each of those nations. As is pertinent here, the arbitral award was confirmed and

judgment was entered on December 4, 2001 by the United States District Court for the Southern District of Texas (the "Texas Judgment"). The Texas Judgment was affirmed by the United States Court of Appeals for the Fifth Circuit, whose order affirming the Texas Judgment this Court declined to review. *See Karaha Bodas Co. L.L.C. v. Pertamina*, 190 F. Supp. 2d 936 (S.D. Tex. 2001), *aff'd*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004). In addition to opposing KBC's attempts to enforce the arbitral award, Pertamina commenced annulment actions in the courts of Switzerland and Indonesia. Each of those actions was dismissed. *See Karaha Bodas Co., L.L.C. v. Pertamina*, 364 F.3d 274, 285 (5th Cir. 2004); Ruling, No. 01/BANDUNG/ WASIT.INT/2002, Sup. Ct. of Indon. (Oct. 4, 2004), at 43-44 (Resp't App. 13a-14a).

The New York Enforcement Proceedings

The instant Petitions seek to challenge the Court of Appeals' summary affirmance of the District Court's final judgment ruling that Pertamina is the owner of over $750 million in oil and gas revenues that have passed through Pertamina's bank accounts in New York, and that those revenues are subject to execution under New York law. The proceedings at issue in the Petitions began on February 22, 2002, when KBC registered the Texas Judgment in the District Court pursuant to 28 U.S.C. § 1963. Simultaneously with its registration of the Texas Judgment, KBC moved for, and the District Court issued, a writ of execution and restraining notices (the "Restraining Notices") pursuant to Fed. R. Civ. P. 69 and Section 5222 of the New York Civil Practice Law and Rules ("C.P.L.R."). The Restraining Notices were served on several New York banks including, *inter alia*, Bank of America and Bank of New York, and prohibited the

banks' transfer of funds from Pertamina's accounts. The writ of execution provided that KBC was entitled to execute upon "any property of Pertamina within this jurisdiction." Writ of Execution and Order to Show Cause at 2 (Feb, 22, 2002) (Resp't App. 19a).

Almost immediately following KBC's service of the Restraining Notices, the Government appeared (purportedly as a "non-party with interest") and claimed that it – not Pertamina – owned all the funds in Pertamina's accounts subject to the Restraining Notices (such funds, the "Restrained Funds"). As a result of the Government's competing ownership claim over the Restrained Funds, the District Court held several hearings (including an evidentiary hearing) over the course of two years to determine the ownership of the Restrained Funds and their susceptibility to execution and turnover to KBC.

The LNG Funds

At an initial hearing to consider the Petitioners' competing ownership claims, the District Court bifurcated the Restrained Funds into two groups. The District Court first considered the Restrained Funds resulting from Pertamina's liquefied natural gas ("LNG") operations (the "LNG Funds"). On April 26, 2002, the District Court ruled that Pertamina was the owner of a small portion of the LNG Funds known as the "Retention Fee." The District Court's ruling was based on an Indonesian law that expressly allocates the LNG Funds into a "Government Portion" and a "Pertamina Portion." The District Court held that the Indonesian Government owned the remainder of the LNG Funds, and that the LNG Funds owned by the Government were not subject to execution because the Government was not the judgment debtor.

The Court of Appeals affirmed the District Court's April 26, 2002 Order in all respects. The Court of Appeals first found that under Rule 69, it was required to "apply New York law to determine what assets are 'subject to enforcement, and thus available'" for execution by KBC. *Karaha Bodas Co., L.L.C. v. Pertamina*, 313 F.3d 70, 83 (2d Cir. 2002) ("*Karaha Bodas I*"). Like the District Court, the Court of Appeals then considered Section 5201 of the C.P.L.R., the New York law provision that defines the types of property against which a judgment creditor may enforce a judgment. After considering the language of Section 5201 and New York decisional law construing it, the Court of Appeals, like the District Court, concluded that KBC's right to execute upon the LNG Funds was dependent upon Pertamina's property interest in the LNG Funds. Specifically, the Court of Appeals found that, under Section 5201, KBC was entitled to execute upon any portion of the LNG Funds that Pertamina could "assign or transfer," including any future interest in the LNG Funds.

Finding that the parties agreed that New York law governed the question of what types of property could be attached, the Court of Appeals considered whether Pertamina's ownership interest in the LNG Funds was properly defined by New York or Indonesian law. Applying New York choice-of-law principles, the Court of Appeals found (a) that there was no actual conflict between New York law and Indonesian law insofar as they affected Pertamina's property interest, and (b) that even if there were a conflict between New York and Indonesian law, "New York choice-of-law rules would mandate application of Indonesian law to determine the relative property interests" of Pertamina and Indonesia in the disputed funds. *Karaha Bodas I*, 313 F.3d at 88.

Applying relevant Indonesian law principles, the Court of Appeals found that Pertamina owned the Retention Fee and that the Retention Fee was subject to execution by KBC. Specifically, the Court of Appeals found that Article 5 of Indonesian Government Regulation 41 established a "Government Portion" of the LNG Funds, and that this portion – consisting of all the LNG Funds except the Retention Fee – was owned by Indonesia. As for the Retention Fee, the Court of Appeals found that Pertamina had a future interest in the percentage of the LNG Funds comprising the Retention Fee, and that under Section 5201 of the C.P.L.R., this future interest – which the Court of Appeals characterized as "property within Pertamina's control, which only Pertamina controls" – was subject to execution. *Karaha Bodas I*, 313 F.3d at 92.

Both the District Court and the Court of Appeals conducted a thoroughgoing analysis of the relevant principles of Indonesian law in making their ownership determinations. The District Court accepted and relied upon the declarations of Indonesian law experts proffered by both KBC and the Government, and the Court of Appeals relied upon these declarations as well. Furthermore, while ultimately rejecting petitioners' argument that Pertamina lacked an executable interest in the Retention Fee, the Court of Appeals noted its agreement with its sister circuits that the Government's proffered interpretation of Indonesian law was entitled to deference, but not conclusive effect.

Pertamina and the Government filed respective Petitions for a writ of *certiorari* from this Court. Both Petitions were denied on June 2, 2003.

The Refinery Funds

Following its adjudication of the LNG Funds, the District Court directed the parties to make submissions concerning the ownership of the second category of funds held in Pertamina's name, which consist of revenues from Pertamina's sale of refined petroleum products to purchasers outside Indonesia (the "Refinery Funds"). As it had with the LNG Funds, the Government claimed to own all the Refinery Funds, although its claim relied on a different set of Indonesian laws than had governed ownership of the LNG Funds. The Government claimed that because the "BBM System" established under Indonesian law requires Pertamina to sell petroleum domestically on a "no-profit no-loss" basis (with the Government responsible for compensating Pertamina for any losses), Pertamina's revenues from export sales are constructively owned by the Government. The Government's initial motion seeking release of the restrained Refinery Funds identified two specific provisions of Indonesian law in support of its ownership claim; in the course of briefing KBC's motion for turnover of the Refinery Funds, however, the Government later identified no fewer than five additional laws that it claimed supported its position.

The District Court held a two-day evidentiary hearing on the Refinery Funds in October 2004. During that hearing, the District Court took evidence from KBC's expert on Indonesian law and from the Government's witness, a government auditor who gave extensive testimony concerning the use and accounting treatment of the Refinery Funds. Despite having specifically requested the opportunity to do so, neither Pertamina nor the Government called a witness to offer testimony concerning the Indonesian laws

that the Government claimed vested ownership of the Refinery Funds in the Government.

At the conclusion of the hearing, the District Court ruled from the bench that the Refinery Funds were completely within Pertamina's possession and control, and consequently, that they were owned by Pertamina and subject to execution pursuant to C.P.L.R. § 5201 and the Court of Appeals' December 2002 ruling. The District Court relied upon unrebutted record evidence demonstrating that Pertamina maintains actual and continuous possession of the Refinery Funds and that it is legally free to spend those funds for any purpose authorized by its budget (including paying the arbitration award). The District Court further found that because the Indonesian laws urged on it by the Government and Pertamina did not contain any language suggesting that the funds were owned by the Government, the evidence of Pertamina's complete possession and control of the Refinery Funds mandated a finding that Pertamina owned them.

The Court of Appeals summarily affirmed the District Court's order. Like the District Court, the Court of Appeals found that because Pertamina and the Government failed to identify any "Indonesian legal directive that deems the refinery funds Indonesia's," the compelling evidence of Pertamina's exclusive possession and control of the Refinery Funds left the presumption of Pertamina's ownership of those funds unrebutted. *See Karaha Bodas Co. v. Pertamina*, No. 04-6551, 2006 WL 565694, at *1 (2d Cir. Mar. 9, 2006) ("*Karaha Bodas II*").

Pertamina's Refusal to Pay

There is no question that Pertamina owes KBC the money at issue in this case: the arbitral panel ordered payment, the U.S. District Court for the Southern District of Texas confirmed that award and entered judgment upon it in December 2001, the U.S. Court of Appeals for the Fifth Circuit affirmed that judgment, and this Court denied *certiorari*. For more than four years, Pertamina has been a recalcitrant judgment debtor, repeatedly attempting to prolong and complicate these proceedings.

The District Court admonished Pertamina and the Government to stop wasting the court's time with their misconduct. The court aptly observed that these proceedings were "a complete waste of litigation," Tr. of Proceedings before S.D.N.Y., May 7, 2004 ("May 7 Tr."), at 2:14-16 (Resp't App. 25a), and noted the impropriety of Pertamina's and the Government's arguments:

> I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

Id. at 6:23-7:4. (Resp't App. 25a).

Repeatedly, the District Court criticized Pertamina and the Government for complicating the issues unnecessarily. For instance, at its October 5, 2004 hearing, after Pertamina

informed the District Court that it was refusing to honor a previous promise to pay the Texas Judgment as soon as this Court denied *certiorari* with respect to the Fifth Circuit's affirmance of it, the District Court warned Petitioners:

> Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.

Tr. of Proceedings before the S.D.N.Y., Oct. 5, 2004 ("Oct. 5 Tr."), at 3:22-4:3 (Resp't App. 27a); *see also* Apr. 19, 2004 ltr. from M. Slater to the Hon T.P. Griesa, at 2 (Resp't App. 29a) ("Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful."); Oct. 5 Tr., at 2:23-25 (Resp't App. 26a) ("Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter. . ."). At the District Court's invitation, KBC has filed a motion for sanctions as a result of this and other misconduct. The District Court will hear that motion on August 25, 2006.

Several other courts, both U.S. and foreign, have criticized Petitioners' litigation tactics in this case. For example, the Fifth Circuit concluded that Pertamina's litigation conduct was "dubious and somewhat deceptive" and likely undertaken "in bad faith." *Karaha Bodas Co. v. Pertamina*, 335 F.3d 357, 369 n.50, 372 (5th Cir. 2003). The

Fifth Circuit again noted its disapproval of Pertamina's conduct when it affirmed the Texas Judgment, stating that:

> We reject Pertamina's efforts to delay or avoid enforcement of the Award as **evidencing a disregard for the international commercial arbitration procedures it agreed to follow** ... We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

Karaha Bodas Co. v. Pertamina, 364 F.3d 274, 282 & n.5 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004) (emphasis added); *see also* Tr. of Proceedings before S.D. Tex., Apr. 2, 2002, at 15:8-13; 32:11-23; 42:7-9 (Resp't App. 31a-32a) (stating that the court was "furious" at Pertamina's conduct); Decision, No. HCCT28/2002, High Court of Hong Kong, (Mar. 27, 2003), at 14:H-J (Resp't App. 36a) (characterizing Pertamina's arguments in a related action to enforce the judgment as "forlorn"); Tr. of Oral Exam. of George Chan, at 78:8-79:4 (Resp't App. 38a) (High Court of Hong Kong issuing a criminal warning to an employee of one of Pertamina's subsidiaries after the court learned of "blatant" disobedience of its garnishment orders).

In sum, Petitioners have a long history of attempting to avoid payment by obfuscating the issues, and their efforts to identify a relevant circuit split are just the latest of their dilatory strategies.

REASONS FOR DENYING THE PETITION

I. The Second Circuit And The District Court Properly Considered And Determined The Indonesian Law Issues Before Them

In their respective Petitions, Pertamina and the Government each argue that the courts below accorded insufficient deference to the Government's proffered interpretation of its domestic laws. Petitioners couch their respective attacks on the Court of Appeals' decision in terms of the need for "international comity," "deference," and "respect." To be sure, those concerns are firmly embedded in American law. They are not, however, implicated by this case. An examination of the decisions below shows that both the District Court and the Court of Appeals carefully considered both the Indonesian laws and the Government's proffered interpretations of those laws in performing their respective analyses, but ultimately rejected the Government's interpretations as being inconsistent with the text of the Indonesian laws themselves.

A. The District Court And The Court Of Appeals Properly Considered The Indonesian Laws Cited By The Government In Determining The Ownership Of The Refinery Funds

Both the District Court and the Court of Appeals conducted painstaking examinations of each of the Indonesian laws relied upon by Pertamina and the Government, and the decisions concerning the Refinery Funds issue were predicated on those courts' findings that none of the laws purportedly governing the Refinery Funds contained any provision establishing governmental

ownership. *See Karaha Bodas*, 2006 WL 565694; *Karaha Bodas Co. v. Pertamina*, No. M-18-302, 2004 WL 2712556 (S.D.N.Y. Nov. 24, 2004). Indeed, the record reflects that the District Court reached its decision only after considering a voluminous evidentiary record that included 27 declarations submitted by Pertamina and the Government concerning the Indonesian legal regime (including six declarations from its legal expert, Sudargo Gautama, an Indonesian law professor who served as Pertamina's lead counsel in some of the proceedings in this dispute), the in-court testimony of Tahria Syafrudin (an Indonesian government official called by the Government to explain the Indonesian laws relied upon by Petitioners), the deposition testimony of Bambang Wiranto (a former Pertamina official who was designated as Pertamina's Rule 30(b)(6) witness to testify about the Indonesian legal regime), and the in-court testimony of Robert Hornick (KBC's expert witness concerning Indonesian law). Thus, Pertamina's suggestion that the courts below "completely ignored" the Indonesian laws cited by Petitioners in support of their argument is forcefully belied by the record.

Furthermore, the record demonstrates that the decisions below were manifestly correct. As KBC noted during the proceedings below, Indonesia clearly knows how to adopt laws vesting ownership of Pertamina's revenues in the Indonesian government: Regulation 41 (which the District Court and the Court of Appeals relied upon in finding that the Government owned the majority of the LNG Revenues) contained express language creating a "Government Share" of those revenues. The laws cited by Petitioners in support of their arguments on the Refinery Funds, in contrast, did not contain any such language. The lack of such language, combined with the unrefuted record evidence that Pertamina

alone possesses, controls, spends, and accounts for the Refinery Funds as its own, confirms the correctness of the decisions below finding Pertamina to be the sole owner of the Refinery Funds.[1]

B. When A Foreign State That Is A Litigant Profers A Self-Interested Interpretation Of Its Law To Suit Its Ends In The Litigation, A Federal Court Is Free To Evaluate The Legal Claim For Itself

Rule 44.1 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

Federal courts have ruled consistently that the text of Rule 44.1 vests district courts with broad authority to

1. Equally unavailing is the Government's argument that the Court of Appeals erred in failing to "conduct[] an independent examination of the principles underlying the concepts of Bezitter and Eigendomsrecht," Min. Pet., at 27. KBC does not dispute the existence of these legal concepts, but notes instead that, as presented by Indonesia's expert, they add nothing to the Indonesian law ownership analysis. Dr. Gautama, the Government's legal expert, himself noted that a party's status as a "bezitter" can be rebutted by evidence that that party has unrestricted use of the property at issue. Here, the District Court and Court of Appeals each found that Pertamina's exclusive use of the Refinery Funds compelled a conclusion that it owned those funds outright. In sum, while neither of the courts below used the terms "bezitter" or "eigendomsrecht" in their analysis, it is clear that their analyses addressed those concepts and supported a conclusion that they were inapplicable.

determine foreign law. *See Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) ("[Rule 44.1] provides courts with broad authority to conduct their own independent research to determine foreign law. . . .") (quoting *Bel-Ray Co., Inc. v. Chemrite*, 181 F.3d 435, 440 (3d Cir. 1999); *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) ("We urge district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations."); *In re Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) ("The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.") (quoting Rule 44.1 advisory committee's notes), *aff'd*, 161 F.3d 314 (5th Cir. 1998)). Indeed, "federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities." *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.), *cert. denied*, 531 U.S. 917 (2000) (quoting *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y. 1980)).

Furthermore, while several courts – including the Court of Appeals in this case – have held that a foreign sovereign's interpretation of its domestic law is entitled to deference, those courts have also noted that the deference owed a foreign state's interpretation is not unlimited. *See, e.g., Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 192 (E.D.N.Y. 2003) ("although we begin with a presumption that the High Arbitrazh Court's December 18, 2001 decision constitutes probative evidence of matters of Soviet law addressed therein, [the] court is not under any absolute obligation to follow the lead of the Russian courts in construing Soviet

law") (citing *Karaha Bodas I*, 313 F.3d at 92) ("[A] foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference.").[2]

It necessarily follows, therefore, that lower courts are free to reject the interpretation of a foreign sovereign, particularly where that sovereign has a stake in the outcome of the litigation.

In sum, the Petitions essentially ask this Court to measure the appropriateness of a lower court's treatment of foreign law through an outcome-based analysis: the only degree of "deference" that would satisfy Petitioners in this case is a ruling holding that the Indonesian laws at issue bar KBC's enforcement claims. But Rule 44.1 expressly vests courts – not self-interested sovereign litigants – with the authority to determine issues of foreign law. The clear text of Rule 44.1 and the consistency with which it has been interpreted leaves no need for this Court to adopt a new rule giving a sovereign's interpretation of its own laws conclusive effect.

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2. In the circumstances presented here, the Government is not entitled to any deference as a matter of international comity. The Third Circuit has stated that "comity promotes predictability and stability in legal expectations, two critical components of successful international commercial enterprises. It also encourages the rule of law, which is especially important because as trade expands across international borders, the necessity for cooperation among nations increases as well." *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001). Indonesia and its wholly-owned and controlled state company have resolutely refused to pay the award, in defiance of the rule of law. To allow the Government to obtain the protection of comity would impermissibly allow it to "reap the benefits of our courts while avoiding the obligations of international law." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632-34 (1983).

C. The Court Of Appeals Did Not Presume Any Similarity Between U.S. And Indonesian Law In Deciding Ownership Of The Refinery Funds

The Government points to a single sentence of the Court of Appeals' decision in *Karaha Bodas II* as evidence that the Court of Appeals failed to "analy[ze] Indonesian law on its own terms." Min. Pet., at 24. Specifically, the Government claims that the Court of Appeals' statement that under the BBM regime "Indonesia acts like a guarantor" draws an improper analogy to U.S. law.

Contrary to the Government's suggestion, the concept of a guarantor is not limited to U.S. law. As Government's own legal expert, Sudargo Gautama, has acknowledged, the Indonesian Civil Code also expressly permits the formation of guarantee relationships. *See* Sudargo Gautama, *Essays In Indonesian Law* 298-99 (1991) ("Personal guarantee for the debts of another person is regulated in Articles 1820 et seq. of the Civil Code."); Sudargo Gautama, Indonesia, 3 *Legal Aspects Of Doing Business In Asia And The Pacific* 193, 211 (1984) ("A guarantor has the same obligation as the debtor"); *see also* William A. Sullivan, *Indonesia*, INS 75-522 (CCH Asia Limited 2004) ("Personal guarantees are well known in Indonesia").

Because Indonesian law recognizes concepts of guarantee, there is nothing to support the Government's contention that the Court of Appeals "presume[ed] that the rights and obligations under U.S. law . . . are analogous to Indonesia's rights and obligations . . . vis-à-vis the Refinery Revenues." Rather, the Court of Appeals could very well have been referring to Indonesian guarantee principles. In all events, the Court of Appeals' statement was clearly intended

to be illustrative, and the Government's suggestion that the Court of Appeals' inclusion of this single sentence somehow led to the wrong result is difficult to credit.

D. Pertamina Lacks Standing To Challenge The Court Of Appeals' Conclusions Concerning Indonesian Law

Pertamina lacks standing to seek *certiorari* of the Court of Appeals' decisions insofar as those decisions relate to the Refinery Funds. A party lacks standing under Article III of the Constitution to bring an action in federal court, including a review of an earlier decision, unless the party has suffered "injury in fact." *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The lower court decisions holding that Pertamina is the lawful owner of the Refinery Funds did not themselves cause Pertamina injury. As such, Pertamina has no standing to appeal the decisions on the ownership of the Refinery Revenues.

Moreover, to the extent Pertamina attempts to justify its petition by pointing to purported harm suffered by the Government of Indonesia, Pertamina lacks standing to bring such a claim as well. *See, e.g.*, PT Pet., at 14 ("the Second Circuit deprived the Government of Refinery Revenues"). "[G]enerally [a party] must assert his own legal rights and interests, and cannot rest his claim for relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). A party is only permitted to assert the rights of a third party where it can make two additional showings: (1) a close relationship with the person who possesses the right; and (2) the existence of a hindrance to the other party's

ability to protect his own interests. *Kowalski*, 543 U.S. at 130 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (holding attorneys did not have standing to assert rights of inmates denied counsel on appeal)).

Any suggestion that the Government has been "hindered" in protecting its interests in this case is simply not credible: the Government has been fully engaged in the New York proceedings since their commencement, and has submitted both briefing and evidence in connection with every issue considered by the District Court and the Court of Appeals. For this reason alone, Pertamina's petition should be denied.

II. There Is No Conflict Between The Circuits Concerning Federal Courts' Application Of Rule 69 In Execution Proceedings Against Foreign States

In *Karaha Bodas I*, the Court of Appeals employed a two-step procedure in choosing the appropriate law. First, pursuant to the express mandate of Rule 69, the Court looked to New York law to determine the **types** of property that are subject to execution, that is, to determine "what assets are 'subject to enforcement, and thus available to judgment creditors.'" *Karaha Bodas I*, 313 F.3d at 83 (quoting *Alliance Bond Fund Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 190 F.3d 16, 20 (2d Cir. 1999)). The Court of Appeals concluded that New York law permitted KBC to execute upon any property that Pertamina could "assign or transfer." *Id.* (citing N.Y. C.P.L.R. § 5201(b)). In the second step, the Court of Appeals resolved the issue of who actually owned the property that was subject to execution. In making this second determination, the Court of Appeals had, as an initial matter, to decide which choice-of-law rules to use to select the law that would govern the second issue. The Court of Appeals

rejected the Government's request that it apply federal common law choice-of-law rules to this second step; it instead applied the choice-of-law rules of the forum, New York, which require an interest analysis. As a result of this interest analysis, the Court of Appeals determined that Indonesian law, rather than New York law, governed the issue of who owned the property. Applying Indonesian law, the Court of Appeals found that the Government owned all of the LNG Funds, except the Retention Fee; as to the Retention Fee, the Court of Appeals found that Pertamina owned an executable future interest which was executable under New York law. Applying the same principles, the Court of Appeals found in *Karaha Bodas II* that Pertamina owned the Refinery Revenues.

The Government now claims that the circuits disagree about "whether the FSIA requires a federal court to apply a federal common law choice-of-law rule or the forum state's rules." Min. Pet., at 9.

> If the Court of Appeals had applied a federal common law choice of law rule, it would have also applied federal common law instead of New York law as the substantive rule of decision, as did the *Bancec* court. In doing so, the Court of Appeals would not have held that any part of the restrained funds was subject to execution as Pertamina's 'future interest' in the Retention Fee. . . .

Min. Pet., at 21.

Thus, the Government is now arguing that federal common law choice-of-law rules should have been applied to **both** steps of the Court of Appeals' analysis. That is, it now contends that federal common law choice-of-law (and through it federal substantive common law) should displace at the first step the

normal Rule 69 requirement that a court apply forum law in order to determine what types of property may be attached. The Government also contends that federal choice-of-law principles should displace the forum's choice-of-law principles at the second step, the determination of the respective property rights in the attached property.

The Government's characterization of the Court of Appeals' decision is inaccurate and misleading. A proper analysis of the record demonstrates irrefutably that there is no basis for granting the petition.

First, there is no conflict between the circuits concerning the use of Rule 69 in the first step of attachment proceedings against foreign states. None of the Ninth Circuit cases relied upon by the Government involved Rule 69 in execution proceedings against foreign states. *See Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561 (9th Cir. 1992) (determining applicable choice-of-law rule to use in considering applicability of illegality defense); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) (determining applicable choice-of-law rule to use in considering wrongful death liability); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (determining what choice-of-law rule controls application of respondent superior principles). Indeed, Rule 69 can properly be viewed as a mandatory choice-of-law for the first step of attachment proceedings, and it is mandatory even with respect to foreign states because nothing in the FSIA displaces it.[3]

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3. The Advisory Committee Note accompanying Rule 69 contains a list of federal statutes governing execution or garnishment of property that the Advisory Committee considered to displace Rule 69. This list makes no mention of the FSIA. *See* Fed. R. Civ. P. 69 advisory committee's note.

The lack of any conflict of authority concerning the use of Rule 69 in cases such as this is apparent from the fact that federal courts have uniformly relied upon Rule 69 – and the state law attachment principles it incorporates – in attachment proceedings involving foreign sovereigns. *See, e.g., Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005) (applying state law as directed by Rule 69 despite argument that the FSIA should control all issues in which it is implicated); *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999) (finding that Rule 69(a) required the application of state law to determine the propriety of a garnishment against a foreign instrumentality); *Flatow v. Alavi Found.*, No. 99-2409, 2000 WL 1012956, at *1 (4th Cir. July 24, 2000) (noting, in a case involving the FSIA, "that Rule 69 of the Federal rules of Civil Procedure dictates that state law and procedures control proceedings on writs of attachment in aid of execution"). Because federal decisional law is uniform concerning the application of Rule 69 and forum law to execution proceedings against foreign states, there is simply no conflict justifying this Court's intervention here.

Second, there is no difference between the federal common law choice-of-law rules and the New York choice-of-law rules. The Government conceded below that the federal common law choice-of-law rule it proposed would mandate an "identical inquiry" as that required by the New York choice-of-law rule. Brief of Non-Party Appellant at 42, *Karaha Bodas I*, 313 F.3d 70 (2d Cir. 2002) (No. 02-7513). As the Government then conceded, "[b]ecause federal common law choice-of-law rules and the choice-of-law rules of New York both employ interest-based analysis and both lead to an application of Indonesian substantive law, there is no real conflict here as to which choice-of-law rule to use." *Id.*

Third, the Government never argued below that federal choice-of-law principles should displace Rule 69's requirement that the court look to forum law to determine, at the first step, what types of property could be attached. In fact, as the Court of Appeals noted:

> While the litigants agree that New York law governs what property can be attached, they diverge on what law governs the property rights of the Republic of Indonesia and Pertamina in the disputed funds.

Karaha Bodas I, 313 F.3d at 84. Because the Government did not raise this issue below it cannot raise it now. *See National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors v. Mineta*, 534 U.S. 103, 109 (2001).

Fourth, the Government's new contention that the Court of Appeals should not have used New York's "future interest" rule of decision is wholly irrelevant to the Court of Appeals' determination in *Karaha Bodas II* concerning the Refinery Revenues. The dispute concerning Pertamina's "future interest" is simply not applicable to the Refinery Funds, which Pertamina alone possesses and controls from the day it receives them in New York until the day it spends them in Indonesia or elsewhere. The "future interest" dispute is limited to the Retention Fees, which flow through the New York accounts but which are only finally paid to Pertamina in Indonesia. Accordingly, even if this Court were to completely accept the Government's argument to apply federal common law instead of New York's "future interest" rule of decision, the Court of Appeals' decision in *Karaha Bodas II* would be unaffected, and KBC would still be

entitled to turnover of the full amount of the Texas Judgment. It would thus be improvident to grant the Government's petition on this issue.

Fifth, Pertamina and the Government **prevailed** on the ultimate choice-of-law issue. The Court of Appeals found that under the New York choice-of-law analysis, the extent of Pertamina's property interest in the disputed funds was required to be determined under Indonesian law – as Petitioners urged – rather than under New York law, as contended by KBC. *Karaha Bodas I*, 313 F.3d at 84-88. The Court of Appeals then found that, under the Indonesian law principles urged on it by the Government, Pertamina's interest in the LNG Funds was limited to its interest in the Retention Fee, which it further found was property subject to execution under New York law. Similarly, in *Karaha Bodas II* the Court of Appeals looked to Indonesian law in determining that Pertamina owns the Refinery Revenues. Accordingly, as with the "future interest" issue, the District Court and the Court of Appeals applied the substantive law urged on them by Petitioners.

CONCLUSION

For all the foregoing reasons, this case simply does not present a "direct, open conflict in the courts of appeals." The lack of any such conflict, coupled with the Court of Appeals' adoption of the governing law urged on it by Petitioners, illustrates the lack of any need for this Court's intervention. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RULE AND STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VIII. PROVISIONAL AND FINAL REMEDIES

Amendments received to April 18, 2003

Rule 69. Execution

(a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Appendix A

(b) Against Certain Public Officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5201. Debt or property subject to enforcement; proper garnishee

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix A

(c) Proper garnishee for particular property or debt

1. Where property consists of a right or share in the stock of an association or corporation, or interests or profits therein, for which a certificate of stock or other negotiable instrument is not outstanding, the corporation, or the president or treasurer of the association on behalf of the association, shall be the garnishee.

2. Where property consists of a right or interest to or in a decedent's estate or any other property or fund held or controlled by a fiduciary, the executor or trustee under the will, administrator or other fiduciary shall be the garnishee.

3. Where property consists of an interest in a partnership, any partner other than the judgment debtor, on behalf of the partnership, shall be the garnishee.

4. Where property or a debt is evidenced by a negotiable instrument for the payment of money, a negotiable document of title or a certificate of stock of an association or corporation, the instrument, document or certificate shall be treated as property capable of delivery and the person holding it shall be the garnishee; except that section 8-112 of the uniform commercial code shall govern the extent to which and the means by which any interest in a certificated security, uncertificated security or security entitlement (as defined in article eight of the uniform commercial code) may be reached by garnishment, attachment or other legal process.

Appendix A

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED CIVIL PRACTICE LAW AND RULES CHAPTER EIGHT OF THE CONSOLIDATED LAWS ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

§ 5222. Restraining notice

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature

or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in

the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the

restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order.

(d) Notice to judgment debtor or obligor. If a notice in the form prescribed in subdivision (e) has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns

a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR

Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK

State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be "exempt". The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Alimony or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions; and

9. Veterans benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

* * * *

APPENDIX B — RULING

NUMBER: 01/BANDUNG/WASIT.INT/2002
FOR JUSTICE BASED ON ALMIGHTY GOD

THE SUPREME COURT

having heard the appeal of the District Court's ruling regarding an Arbitral Award has handed down the following ruling in the case of:

KARAHA BODAS COMPANY, L.L.C, a corporation established under the laws of the Cayman Islands, domiciled at Jalan T. B. Simatupang, Kav. 10, Jakarta 12310, now with offices c/o Jaya Geothermal, L.L.C. 565 Fifth Avenue, 29th Floor, New York 10017, in this matter represented by their attorneys: RAMBUN TJAJO, JD, SARAH NATALIA, JD, and PERRY CORNELIUS, JD, Attorneys and Lawyers, with offices in the Graha Niaga, 2nd Floor, Jalan Jenderal Sudirman, Kaveling 58, Jakarta 12190, the Appellant, the former Defendant;

versus

THE STATE OIL AND GAS COMPANY (PERTAMINA), with offices at Jalan Perwira No. 2, Jakarta 10110, in this matter represented by their attorneys: 1. Prof. Dr. S. Gautama, Esq., 2. Dr. T. Tuegeh Longdong, JD, LLD, 3. Liz Asnahwati, JD, and 4. Tety Irawati, JD, Attorneys and Lawyers with offices at Jalan Medan Merdeka Timur, No. 9, Jakarta 10013, the Appellee, formerly the Plaintiff;

Appendix B

and

PT. PLN (Incorporated), domiciled at Jalan Trunojoyo, Kebayoran Baru, South Jakarta 12160, in this matter represented by their attorneys: 1. Derina, JD., 2. Rex R. Panambunan, JD., and 3. Bobby Hadi Pumomo, JD., all employees of PT. PLN (Incorporated), with offices at Jl. Trunojoyo, Block M I/135, Kebayoran Baru, South Jakarta, the Co-Appellee, formerly the Co-Defendant;

The Supreme Court;

Having read the relevant documents;

* * *

filed by the Arbiter or his attorney;

To consider, that the opinion of the Supreme Court on the above-mentioned reasons:

regarding the objections to 3 and 4:

that these objections can be upheld because the lower-court judge misinterpreted the law in the following considerations:

a. that the Plaintiff's suit was basically a suit to set aside the Arbitral Award reached in Geneva, Switzerland on December 18, 2002 (Final Award in an Arbitration Procedure under the UNCITRAL Arbitration Rules), Exhibit P-1);

b. that under Article 1 Point 9 of the Law No. 30 of 1999, the ruling handed down by an arbitration institution or an individual arbiter outside the jurisdiction of the Republic of Indonesia, as in the arbitration decision whose setting aside was petitioned for by the Plaintiff (Exhibit P-1), is the International Arbitral Award;

c. that Law No. 30 of 1999 only governs International Arbitration in Article 65 through Article 69, which besides governing the conditions for recognizing and enforcing a International Arbitral Award in Indonesia, also governs the procedures for petitioning for said Arbitral Award;

d. that Article V Paragraph (1) of the New York Convention of 1958 (Convention on the Recognition and Enforcement of International Arbitral Awards) which was ratified and declared in force by Presidential Decree No. 38 of 1981 reads:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if. . . . etc.;

e. "The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

that furthermore Exhibit T.5 shows that the Plaintiff's and the co-Defendant's attorney has filed an appeal against the

Appendix B

Arbitral Award under dispute (Exhibit P-1) with the Swiss Supreme Court under the International Civil Law of Switzerland;

f. that therefore the Central Jakarta District Court does not have the authority to hear and rule on the suit to set aside the International Arbitral Award filed by the Plaintiff;

Considering that based on the above considerations, and without the need to take into consideration the other objections, in the opinion of the Supreme Court there are sufficient reasons to grant the appeal of the Appellant KARAHA BODAS, LLC and to set aside the Central Jakarta District Court ruling dated August 27, 2003 No. 86/PDT.G/2002/PN.JKT.PST, and the Supreme Court will render its own decision on this case with such disposition as to be stated below;

Considering that therefore the Appellee is the losing party, it will be ordered to pay court costs at both levels of justice;

Noting the Articles of Law No. 30 of 1999, Law No. 14 of 1985 as amended by Law No. 5 of 2004 as well as other Articles of the relevant laws;

TO RENDER A DECISION TO

grant the appeal of the Appellant KARAHA BODAS, L.L.C.;

set aside the Central Jakarta District Court ruling dated August 27, 2002 No.86/PDT.G/2002/PN.JKT.PST;

TO RENDER ITS OWN DECISION

To the Objections

to uphold the Defendant's objections;

To the Application for Interim Relief and in the Substance of the Case

to declare that the Central Jakarta District Court did not have the authority to hear and adjudicate the Plaintiff's suit;

to order the Appellee/Plaintiff to pay court costs at the two levels of justice, which at the appeals level is set at Rp. 500,000 (five hundred thousand rupiah);

In witness thereof the ruling was handed down at the deliberative session of the Supreme Court Council on Monday, March 8, 2004 by Bagir Manan, chief justice of the Supreme Court, as the chairman of the session, Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, as associate members, and pronounced in open court on the same day by the chairman of the session in the presence of Prof. Dr. Paulus E. Lotulung, JD and Marianna Sutadi, JD, associate members, Shirley P. Widodo, JD, substitute clerk in the absence of the two parties.

Appendix B

Associate Members
signed
Prof. Dr. Paulus E. Lotulung, JD
signed
Marianna Sutadi, JD

Chairman
signed
Bagir Manan

Costs:

1. Stamps	Rp	6,000
2. Recording	Rp.	1,000
3. Cassation Administration	Rp.	493,000
Total	Rp.	500,000

Substitute Clerk
signed
Shirley P. Widodo, JD

For the copy
REPUBLIC OF INDONESIA SUPREME CQURT
DIRECTOR OF CIVIL MATTERS
/signature/
ANDAR PURBA, JD
Civil Service ID No. 040015551

/seal/
SUPREME COURT

APPENDIX C — WRIT OF EXECUTION AND ORDER TO SHOW CAUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. M-18-302

In the Matter Of An Arbitration

Between Karaha Bodas Company, L.L.C.,

Petitioner,

v.

Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara ("Pertamina"),

Respondent.

WRIT OF EXECUTION AND
ORDER TO SHOW CAUSE

Upon consideration of the application of Karaha Bodas Company, L.L.C. ("KBC") for a writ of execution, the declaration of Christopher F. Dugan, dated February 22, 2002 and the exhibits annexed thereto, and the accompanying memorandum of law, and sufficient cause appearing therefore; and

Upon consideration of the final judgment (the "Judgment") entered in an action (the "Texas Action") in the United States District Court for the Southern District of Texas

between petitioner KBC and respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") on December 4, 2001, confirming the final arbitral award entered in *Karaha Bodas Company v. Pertamina & Oth*ers. YD/IS 60 319 and awarding KBC $261,166,654.92, plus interest from January 1, 2001; and

Upon consideration of the Order entered by the court in the Texas Action on January 25, 2002 (the "Texas Order") finding that a reasonable time has passed to satisfy the requirements of § 1610(c) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1610(c), and authorizing KBC to commence execution of the Judgment; and

Upon consideration of the *ex parte* Writ of Garnishment issued February 11, 2002 by the court in the Texas Action against Pertamina's assets in Texas; and

Upon consideration of the Certification of Judgment for Registration in Another District, entered by the court in the Texas Action on February 21, 2002 and filed with this Court on February 22, 2002; and

It appearing that Rule 69 of the Federal Rules of Civil Procedure, the FSIA and the Texas Order require a court-ordered Writ of Execution authorizing KBC to execute upon any property of Pertamina within this jurisdiction; and

It appearing that there exist within this jurisdiction certain monies, securities or other assets (the "Funds") in accounts held by or for the benefit of Pertamina (the

"Accounts") and maintained by the banks listed on Exhibit A annexed hereto (the "Banks"); and

It appearing that, pursuant to the FSIA and the Texas Order, a court order authorizing KBC to issue restraining notices upon the Banks pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the New York Civil Practice Law and Rules ("CPLR") applicable thereunder is required; now, therefore

IT IS HEREBY ORDERED, that a Writ of Execution is hereby issued; pursuant to this Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and the FSIA, 28 U.S.C. § 1610(c), KBC is authorized to execute upon any property of Pertamina within this jurisdiction in satisfaction of the outstanding final judgment, amounting, to date in total to the sum of $261,166,654.92 plus interest from January 1, 2001 until full payment; and

IT IS FURTHER ORDERED, that (1) pursuant to the Writ of Execution, Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5222, KBC shall be permitted to serve upon the Banks restraining notices in form substantially similar to the attached Exhibit B; and (2) that each such restraining notice shall be issued either by this Court or by the Clerk of Court; and

IT IS FURTHER ORDERED, that pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and Article 52 of the CPLR, KBC shall promptly serve Pertamina and the Banks with a copy of this order to show cause and the restraining notices, together with papers submitted in support thereof,

and that such service shall be deemed good and sufficient service (1) if made by hand upon counsel for Pertamina, Cleary, Gottlieb, Steen and Hamilton, 1 Liberty Plaza, New York, New York 10006, on or before 5:00 p.m. on February 25, 2002, with a copy by certified mail to Pertamina at 1360 Post Oak Blvd., Suite 1590, Houston, Texas 77056, and (2) if made by hand upon the Banks on or before 5:00 p.m. on February 25, 2002, such service to be made by any person who is over 18 years of age and not a party to this action; and

IT IS FURTHER ORDERED, that Pertamina show cause before the Honorable Thomas P. Griesa, United States District Judge, Courtroom 26B, United States Courthouse, 500 Pearl Street, New York, New York, on the 18th day of March, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, why an order of execution pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and CPLR § 5230 shall not issue to the Sheriff of New York County or the United States Marshal directing him to satisfy the Judgment out of the Funds held by or for the benefit of Pertamina in the Accounts maintained by the Banks; and

IT IS FURTHER ORDERED, that objections or responses, if any, to the relief requested herein shall be filed with the Court and served in a manner so as to be received by (1) counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, on or before 5:00 p.m. on March 12, 2002, and (2) the Banks, on or before 5:00 p.m. on March 12, 2002; and

Appendix C

IT IS FURTHER ORDERED, that KBC make take any and all discovery of the Banks as provided under Rule 26 of the Federal Rules of Civil Procedure, and that all responses to any such discovery requests shall be served in a manner so as to be received by counsel for KBC, Jones, Day, Reavis & Pogue, 599 Lexington Avenue, New York, New York 10022, attention: Steven C. Bennett, no later than five (5) days prior to the hearing.

Dated: New York, New York
February 22, 2002

s/ Thomas P. Griesa
UNITED STATES DISTRICT JUDGE

Appendix C

EXHIBIT A

Bank Indonesia
165 Broadway, 31st Floor
1 Liberty Plaza
New York, New York 10006

Bank of Montreal Trust Company
c/o Harris Trust Company of New York
88 Pine Street
New York, New York 10005

Bank of Nova Scotia Trust Company of New York
One Liberty Plaza, 23rd Floor
New York, New York 10006

Bank of Taiwan New York Agency
The Crown Building Center
730 Fifth Avenue, 9th Floor, Suite 907
New York, New York 10019

Bank Rakyat Indonesia
430 Park Avenue, 2nd Floor
New York, New York 10022-3505

PT Bank Central Asia (Persoro)
641 Lexington Avenue
New York, New York 10022

Appendix C

PT Bank Negara Indonesia (Persero) Tbk
55 Broadway
1 Exchange Plaza, 5th Floor
New York, New York 10006-3002

PT Bank Mandiri (Persoro)
100 Wall Street, 18th Floor
New York, New York 10005-3702

APPENDIX D — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS COMPANY, L.L.C.,

Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUM NEGARA (PERTAMINA),

Respondent.

May 7, 2004
5:10 p.m.

[2] (In chambers; phone conference)

THE COURT: I wanted to talk to you about our schedule. I suppose this is a waste of time, but there is a great deal of useless litigation going on, and I have gotten a start on one motion, which has voluminous papers. It's the motion of KBC about the year 2003, wanting a turnover, a declaration with respect to the 2003 period of time up to November.

Now, that has a voluminous record all itself. Then there is a litigation about the unadjudicated accounts. And you're worried about the schedule. And I don't want to really be

harsh about the schedule. Mr. Slater has asked for some time, and I would certainly like to accommodate that. But all this, of course, is created by the fact that there still is not firm security for this judgment. To me, that is a complete waste of litigation.

* * *

THE COURT: I think the only thing to do is to secure the judgment, and if you can't secure the judgment, I assume this useless litigation will keep going. But I want to warn you, I will not put up with further obfuscation of the issues. I will not put up with it, and there will undoubtedly have to be sanctions for the conduct that has already occurred. It's just not tolerable in a federal court.

* * * *

APPENDIX E — EXCERPTS OF TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 MC 98 (TPG)

KARAHA BODAS CO., L.L.C.,

Plaintiff,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (Pertamina),

Defendant.

October 5, 2004
10:10 a.m.

[2] * * *

MR. SLATER: Your Honor, Matthew Slater for Pertamina. I regret that unfortunately I cannot effectuate that today and I cannot rely on the letter that —

* * *

THE COURT: There is a lawful judgment which is final. There is an indebtedness. It is open and shut. And there was a commitment.

Appendix E

Now, you have a choice and your client has a choice, and the republic has a choice, because the republic undoubtedly has a voice in this, to say the least. I warned you, on the record, and I repeated it, from a certain point — and I'll go over the record — Pertamina will be paying the legal fees of KBC. There is no reason for this complex litigation. There is none at all.

* * * *

APPENDIX F — LETTER FROM MATTHEW D. SLATER TO THE HONORABLE THOMAS P. GRIESA DATED APRIL 19, 2004

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, W.C. 20006-1801
(202) 974-1500

April 19, 2004

VIA FACSIMILE

Hon. Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street, Courtroom 26B
New York, New York 10007

Re: *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*. No. 21-MC-00098

Dear Judge Griesa:

I am writing to report on developments relating to the matters discussed during the telephone status conference conducted on April 12, in particular in relation to the Court's request that Pertamina confirm its readiness to pay the judgment in this case.

As I have previously stated in open court, it is Pertamina's policy to observe its legal obligations and international

commitments. Its preferred method of dispute resolution is amicable agreement, and it continues to seek a negotiated settlement in this case. Although it believes that the arbitration award is deeply and fundamentally flawed (and an Indonesian court has so held) and that all or most of the funds in the restrained accounts belong to the Ministry, it is mindful that the courts in the United States and Hong Kong thus far have concluded that the award may be enforced, and Pertamina has given careful consideration to this Court's questions about Pertamina's intentions as to payment.

I am pleased to report, therefore, that I am now authorized by Pertamina to advise the Court that Pertamina commits to pay the Texas Judgment in the event that its forthcoming petition for writ of certiorari concerning the Fifth Circuit's decision is denied or otherwise unsuccessful. In return, Pertamina expects that KBC will agree to suspend proceedings concerning the arbitration award in other jurisdictions and, upon payment, that KBC would dismiss all such proceedings with prejudice. Pertamina's commitment is without prejudice to its firm position as to the flaws in the arbitration award and as to ownership of the restrained funds, but rather is undertaken to bring this dispute to a conclusion upon a final and unreviewable determination that the arbitration award is enforceable in the United States.

Based on Pertamina's commitment to pay the judgment without regard to ownership of the funds subject to restraint, the litigation before this Court can be suspended, and there is no need for the Rule 30(b)(6) deposition, as both the Court and KBC acknowledged during the April 12 conference.

Accordingly, we respectfully request that the Court vacate or stay its discovery order entered April 15, 2004.

Respectfully,
s/Matthew D. Slater
Matthew D. Slater

cc: Christopher F. Dugan
Carolyn B. Lamm

APPENDIX G — EXCERPTS OF TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

01-CV-634

KARAHA BODAS COMPANY LLC

plaintiff

v

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA

defendant

April 2, 2002
Houston, Texas
12:30 p.m.

PROCEEDINGS

* * *

And that issue was raised. In order for Pertamina in those sorts of circumstances to give greater authority to their counsel, they have to go to the highest reaches of the company.

THE COURT: You know, it's so sad.

Appendix G

MR. SLATER: Sorry?

* * *

First of all, there is no question in my mind that Pertamina, at least on this record, based on Mr. Slater's affidavit, there is no question in my mind that Pertamina had notice of my order to withdraw its injunctive relief request, and there is no question in my mind that they chose for their own reasons, maybe logistical, maybe intentional, not to comply with that request.

There is no question that the Court order was in effect from the moment I issued it onward, so I do find that Pertamina is in contempt, civil contempt, under the standards that have been adopted by the Fifth Circuit in American Airlines, Inc. versus Allied Pilots Association, 228 F3d. 574 at 581. And that is the year 2000.

* * *

THE COURT: I'm furious, Counsel. I'm furious. But I have issued what I think to be a temperate response. Don't test me.

* * * *

APPENDIX H — DECISION OF THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE DATED MARCH 27, 2003

IN HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 28 OF 2002

KARAHA BODAS COMPANY LLC

Plaintiff

and

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA)

Defendant

DECISION

* * *

Appendix H

(b) As a matter of law

17 If, contrary to KBC's primary submission that determination of the *lex arbitri* is a question of fact, it is necessary to construe the arbitration clauses in the contracts to determine the *lex arbitri,* then this court places reliance on the following matters, in coming to the conclusion that the answer remains, Swiss law

18 From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point "The curial law *(lex arbitri)* is normally but not necessarily the law of the place where the arbitration proceedings are held" (*per* Hobhouse J in *Dallal v Bank Mellat* [1980] at p 252 "The place" plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris) For the normal situation not to apply there must be strong pointers to the contrary Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors

(1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri Lord Mustill in *Channel Group v Balfour Beatty Ltd [1993]* AC at p 357 said

> Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the

> arbitration is to be held but in the absence of an explict choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible

Clearly, Pertamina and KBC did not make an "explicit choice" There are many other authorities in support of this general proposition, one being Potter J in *Sumitono v Oil & Natural Gas Commission* [1994] 1 LIoyd's Reports, at p 57

> There is it is true no express choice of curial law However, there is a clear requirement that the arbitration proceedings be held in London In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the seat' of the arbitration, ie the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings —"

It is acknowledged that the presumption may be rebutted by matters other than an express provision

to the contrary, however, it seems to me that in the present case Pertamina's attempt to do so is forlorn

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the *lex arbitri* was to be Indonesian law the contracts would not have been signed I find It irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place

(3) The UNCITRAL rules require that an award is made at the place (or seat) of the arbitration Accordingly, the preliminary award the award itself and the post-award decision were all expressly stated to be made to Geneva All these were done as a matter of course It was never argued that it should be otherwise

(4) Pertamina, as evidence of "strong pointers" to rebut the presumption rely, *inter alia*, on the fact that the contracts themselves are replete with references to the provisions of Indonesian law" The expression "replete with" somewhat overstates the position but they point out that the contracts expressly provide

for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure Article 650 2 (appointment of arbitrators) and 620 1 (time limits on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on "amiables compositeurs") has been invoked and Article 641 (rights of appeal) has been waived

In my judgment the existence of these provisions barely dents the fundamental principle in favour of Swiss law Both parties to this application have produced lengthy and learned academic expert opinions on the issue, and both counsel have argued the strengths and weaknesses of the competing opinions I propose to be extremely sparing in my citation of the various opinions because of the overwhelming weight to be attached to the underlying factual truth that the parties' choice of a neutral seat together with the absence of an express choice of different *lex arbitri* are the dominant factors in the equation which, in this case, results in the answer that commercial common sense demands that Indonesian law was not to be the *lex arbitri* I merely select one passage from the opinion of Mr. Robert Hornick, an American lawyer and academic of great experience in this field

* * * *

APPENDIX I — EXCERPTS OF ORAL EXAMINATION OF GEORGE CHAN

MICHAEL PILKINGTON: Good morning, Master.

MASTER WONG: Yes.

MICHAEL PILKINGTON: I appear for the judgment creditor in this matter and its an oral examination of Mr Chan, who is an officer of the Garnishee Pertamina Energy Trading Limited. So, Master, I have some preliminary comments I would like to make to you, Master, in relation to the background of this matter.

MASTER WONG: Yes.

MICHAEL PILKINGTON: And I think perhaps we can deal with before Mr Chan is actually sworn in to give evidence.

MASTER WONG: It appears to be a blatant breach of a Court order. And Mr Pilkington intends to explore the underlying reason.

Miss Lu, on your behalf, has objected to this line of questioning.

My observation is that this sort of line of questioning is fairly pertinent and can be properly asked within the scope of the Order for Oral Examination.

Save and except that the answer may be given by you could amount to a — may amount to a self-incrimination of yourself. In short, if somebody has stolen something from

others, under caution by the police he or she may elect to remain silent.

So even I will be allowing Mr Pilkington to ask you why in that sense you may exercise your right of silence. But certainly you are reminded that you should not lie to this Court. Otherwise you will be in serious trouble.

* * * *